STB NO. AB-290 (SUB-NO. 184X)

NORFOLK AND WESTERN RAILWAY COMPANY
--ABANDONMENT EXEMPTION--
IN CINCINNATI, HAMILTON COUNTY, OH

Decided May 13, 1998

The Board grants Norfolk and Western Railway Company's requested exemptions, subject to labor protective conditions and an environmental condition.

BY THE BOARD:

By petition filed January 23, 1998, and supplemented on February 5, 1998, Norfolk and Western Railway Company (NW)[1] seeks exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a portion of a line of railroad known as the Riverfront Running Track, extending from NW's milepost 119.3 (at the former Oasis Yard) to milepost 120.8 east of Plum Street, a distance of approximately 1.5 miles, in Cincinnati, Hamilton County, OH. In addition, NW seeks to be exempted from the offer of financial assistance (OFA) provisions under 49 U.S.C. 10904 and the public use provisions under 49 U.S.C. 10905. The United Transportation Union (UTU) requests imposition of labor protective conditions. Senator Mike DeWine of Ohio, the County of Hamilton and NW request expedited consideration.

Pursuant to 49 U.S.C. 10502(b), the Board served a decision on February 12, 1998, and published at 63 Fed. Reg. 7195 (1998), instituting an exemption proceeding.

Comments were filed by two railroad carriers, Indiana and Ohio Railway Company (IORY) and Grand Trunk Western Railroad, Incorporated (GTW), customers/shippers supporting GTW, and the City of Cincinnati (the City). The two carriers do not oppose NW's abandonment of the Riverfront Running Track.

[1] NW is a wholly owned subsidiary of Norfolk Southern Railway Company (NS).

However, they believe that there is a public need for a continued railroad service over the line under a new IORY ownership. IORY wishes to purchase the line under the OFA provisions. Accordingly, IORY and GTW oppose NW's sought exemption from the OFA provisions.

On April 15, 1998, NW and Hamilton County filed replies to the comments of IORY. On May 5, 1998, IORY filed supplemental comments and a response to the replies of Hamilton County and NW and the comments of the City. On May 6, 1998, NW filed a motion to strike the supplemental comments and response of IORY. In the interest of deciding this case on the most comprehensive record available, we will deny the motion to strike and will accept and consider all filings.

We will grant the requested exemptions, subject to labor protective conditions and an environmental condition.

DISCUSSION AND CONCLUSIONS

Abandonment Exemption. NW acquired the Riverfront Running Track on April 1, 1976, as part of the Final System Plan under the Regional Rail Reorganization Act of 1973 (3R Act). According to NW, abandonment of the Riverfront Running Track will allow the City and Hamilton County to proceed with several Riverfront revitalization projects unhindered by the track structure. An agreement entitled "Transition Agreement," dated April 11, 1995, entered into by NW and the City provided for the City's acquisition of the right-of-way once all rail carrier interests were discontinued and extinguished, and NW had abandoned the line. As part of the same agreement, the City agreed to facilitate the construction of the "Third Main" track on an existing rail line through Cincinnati's Millcreek Valley, to make available to NW additional operating capacity and thereby make the Riverfront Running Track unnecessary even as a contingency for future increased capacity. Discontinuances were sought for all other rail carrier interests.[2]

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[2] *See, The Cincinnati Terminal Railway Company (Indiana & Ohio Railway Company, Successor)--Discontinuance of Service Exemption--In Cincinnati, Hamilton County, OH,* STB Docket No AB-532X (STB served February 12, 1998); *Consolidated Rail Corporation--Discontinuance of Trackage Rights Exemption--in Cincinnati, Hamilton County, OH,* STB Docket No. AB-167 (Sub-No. 1180X) (STB served February 12, 1998); and *Grand Trunk Western Railroad Incorporated--Adverse Discontinuance of Trackage Rights Application--A Line of Norfolk and Western Railway Company in Cincinnati, Hamilton County, OH, (GTW Adverse Discontinuance)* STB Docket No. AB-31 (Sub-No. 30) (STB served May 13, 1998).

(continued...)

NW's General Manager Western Region, M. D. Manion, certified that no local traffic has originated or terminated on the line for at least 2 years; that overhead traffic has been rerouted over other lines, and that no formal complaint filed by a user of rail service on the line or a state or local government entity acting on behalf of such user regarding cessation of service over the line either is pending before the Surface Transportation Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.

According to NW, overhead traffic that would have moved over the line has been moving via a detour over an alternate route for over 11 years because a CSX Transportation Inc. (CSXT) train derailment severely damaged a bridge on the railroad line of NW's affiliate--The Cincinnati, New Orleans and Texas Pacific Railway Company (CNOTP) "High Line" that connects NW's Riverfront Running Track with the interchange point at CNOTP's Gest Street Yard.

NW claims that the public convenience and necessity requires abandonment because there are no shippers on the line and no prospect of any locating there, there is no traffic moving over the line, the line is not needed for overhead traffic, and the property is desired for public use. Moreover, because of the location of the line and projected public uses of the railroad right-of-way and surrounding property, NW contends that there is no public interest in "continuing" and no likelihood of reactivating rail service to any shipper on the line.

NW states that abandonment of the Riverfront Running Track is an essential component of a 20-year effort of public and private interests to redevelop and revitalize Cincinnati's Riverfront area. Abandonment will allow barriers between the City's central business district and the north bank of the Ohio to be removed by reconfiguring the Fort Washington Way expressway (I-71/U.S. 50); building multi-purpose structured parking lots to replace surface parking lots; and expanding and reconnecting the City's downtown area. Further enhancements to the downtown will include: Hamilton County's plans to build a new Cincinnati Bengals football stadium; the possibility of a new Cincinnati Reds baseball stadium; a multi-modal passenger transportation center; a possible future commuter rail station; and a regional family-oriented cultural/entertainment district. Abandonment and removal of the Riverfront

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[2](...continued)

In *GTW Adverse Discontinuance*, NW has petitioned for adverse discontinuance of trackage rights asserted to be held by GTW. NW may only abandon the Riverfront Track requested in this proceeding if it first terminates GTW's trackage rights. Because these proceedings are related, we are issuing decisions in both proceedings concurrently.

Running Track will finally permit two decades of efforts by the City to remove rail traffic from Cincinnati's Riverfront. The need to remove traffic from the line was noted in *CSX Corp.--Control--Chessie and Seaboard C.L. I.*, 363 I.C.C. 521, 584 (1980).

Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also allow NW to avoid the expenses of owning and maintaining this redundant rail line and to apply its assets more productively elsewhere on its system, while permitting the City of Cincinnati to realize its plans for a large scale renewal of its downtown area, thereby promoting safe and efficient rail transportation, fostering sound economic conditions, and encouraging efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy are not affected adversely.

Regulation of the proposed transaction also is not necessary to protect shippers from an abuse of market power. There is no possibility of shipper abuse because the line has not been used for over 11 years. No shippers are located on the line, and any overhead traffic has been or can be rerouted. There is no opposition to NW's abandonment of the line by shippers or other railroads. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

OFA and Public Use Exemptions. NW has also framed its request for exemption to extend to 49 U.S.C. 10904, involving OFAs, and to 49 U.S.C. 10905, involving public use conditions.[3] IORY and GTW oppose an exemption from the OFA provisions.

IORY argues that the Board may not use its exemption authority to exempt the OFA provisions because this is a contested case. IORY notes that the Board and its predessor, the Interstate Commerce Commission, have only granted exemption from the OFA provisions where such exemptions are not opposed.

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[3] NW has stated that it will not negotiate with any party for the transfer of the line for trail use because it has already agreed to transfer the line to the City.

IORY also argues that, because section 10904 is a mandatory forced sale provision, the Board may not, through the exemption process, decline to authorize the transfer of a rail line approved for abandonment, if the financial terms of section 10904 are met. IORY states that the Board's authority to exempt a transaction is necessarily limited by its authority to authorize or deny the transaction in the first instance. Consequently, IORY argues, that the Board may not through the exemption process take an action, such as denying an OFA, that it is not otherwise statutorily authorized to undertake.

Next, IORY and GTW argue that, even if the Board decides it has jurisdiction to exempt from the OFA provisions, the petition for exemption of the OFA provisions should still be denied because there is an overriding public need for a transportation service provided by IORY over the Riverfront Track. Letters from IORY's customers/supporters[4] express a need for IORY's direct service through Cincinnati over the Riverfront Track. IORY, if it is able to purchase the Riverfront Track, would move traffic to the Consolidated Grain and Barge Company. Consolidated Grain and Barge Company operates two rail-barge facilities on the Central of Indiana (CIND)[5] line west of Cincinnati and ships such commodities as grain, fertilizer, salt, pig iron and coal.

The shippers indicate that IORY's only access to this barge facility is via an NS switch through the NS Gest Street Yard or a CSXT switch through the CSXT's Queensgate yard in Cincinnati. Because of alleged significant delays in getting traffic through the NS and CSXT yards and because of the NS's and CSXT's alleged exorbitant switching charges, the shippers indicate that they cannot competitively route their traffic over IORY through Cincinnati. In addition, they claim that the NS and CSXT rail lines through Cincinnati are highly congested. The customers/supporters argue that the Riverfront Track is an essential transportation link that would enable IORY to bypass the congested Cincinnati NS and CSXT rail yards, and provide shippers direct rail access through Cincinnati to barge facilities on the Ohio River.

GTW argues that its on-line shippers[6] require a direct IORY route over the Riverfront trackage with an interchange with transloading facilities on the

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[4] Comments supporting IORY's purchase of the line were submitted by The Anderson, Inc., Auburn Bean & Grain Companies, Consolidated Grain and Barge Co., Michigan Agricultural Commodities, Inc., and The West Central Ohio Port Authority.

[5] CIND is an affiliate of IORY.

[6] The verified statement of Kenneth LaDuke, Account Manager for Metals and Construction for GTW, indicates that a demand for IORY service over the Riverfront Track is needed for its customers: National Steel Corporation, Northstar Steel (Northstar Steel filed a letter supporting IORY's acquisition of the line), and Rouge Steel.

CIND. It submits that its shippers do not have access to a rail/barge transloading facility on the Ohio River at Cincinnati other than the one served exclusively by CSXT. It explains that the only other present alternative is through the NS's Gest Street Yard to CIND, but it argues that this option is limited by a 1993 Agreement between GTW and NW (with IORY being the successor to GTW). GTW states that the terms of the agreement were limited to moving grain shipments and the movements were limited to Tuesday and Wednesday, with a minimum of eight hours advance notice of arrival, and with a maximum of four round trips per month--not to exceed one round trip per week. GTW adds that NW has refused to extend the agreement for commodities other than grain, and has refused to eliminate the unacceptable operating restrictions on an interchange between IORY and CIND.

IORY also argues that its purchase of the Riverfront Track should be allowed because rail service over the Riverfront Track is not incompatible with the proposed Cincinnati Riverfront redevelopment plan. IORY understands that the redevelopment project provides space for two parallel tracks along the Riverfront to accommodate commuter rail service and that the Southwest Ohio Regional Transit Authority (SORTA) is to be granted the passenger rail operating rights over the Riverfront Track. IORY expresses its belief that freight and commuter rail operations can coexist on the Riverfront trackage. It states that the rail commuter operations along the Cincinnati Riverfront would extend eastward over a rail line IORY recently sold to SORTA and over which IORY will continue to provide rail freight service. IORY states that its proposed rail service over the Riverfront Track would simply extend by about two miles the contemplated sharing of track by IORY and SORTA for joint commuter and freight operations.

IORY explains that, as part of the redevelopment project, the Fort Washington Way is to be trenched and is to include a double tracked rail line. IORY indicates that its operations over that route would therefore be below ground level and not disturb the other planned projects. IORY projects that, if it is allowed to purchase the Riverfront Track, it would transport two loaded trains a day over the track. IORY states that it would have great flexibility in the timing of those trains and would work with the City to accommodate the other interests along the Riverfront area. IORY states that, if it is successful in acquiring the Riverfront Track through the OFA process, IORY will fully cooperate with the City and other interested parties to ensure that the project is not impeded and that the future contemplated use of the Riverfront area is not adversely impacted by IORY's freight operations.

NW, the City, and Hamilton County replied to GTW and IORY, arguing that exemption of the OFA provisions is justified. NW states that the whole predicate of the GTW and IORY arguments for retention of the track and denial of the OFA exemption is that shippers do not have competitive access to a rail/barge transloading facility at Cincinnati other than one served exclusively by CSXT. However, NW asserts that there are competitive options to rail/barge transloading facilities other than the Riverfront Track. NW states that IORY has failed to disclose that it already serves directly the Queen City River Terminals, Inc. on Kellogg Avenue. NW also notes the existence of a dormant Ohio River Grain Company on Eastern Avenue that IORY could serve if reopened at an allegedly limited expense. In addition, NW indicates that IORY can interchange with NW at McCullough Yard and IORY has a direct operation into CSXT's Queensgates Yard without passing through Gest Street Yard and presumably could make some arrangements with CSXT for interchange with CIND when that carrier moves traffic to and from Queensgates Yard.

NW adds that the general congestion has eased at Cincinnati. It disputes IORY's claim that NS has exorbitant switching charges that are a deterrent for IORY using the Gest Street Yard to serve Consolidated Grain and Barge.[7] NW explains that the real problem with operations via CIND to the Consolidated Grain and Barge grain terminal is not the NS intermediate switch charge or operations through Gest Street Yard, but the fact that CIND does not quite reach the terminal. Grain traffic moving via CIND must be trucked across CSXT tracks in order to reach the terminal. This, NW argues, adds cost and time to the service.[8] NW submits, however, that IORY could avoid the added trucking costs, if it shipped grain over CSXT which serves the Consolidated Grain and Barge terminal directly. NW also states that customers willing to export grain via the Ohio River terminals have many options, not just the limited options portrayed by IORY. These customers, according to NW, can ship via the terminals of CF Industries, Cargill Industries, ADM, Consolidated Grain and Barge Riverside, and the Southside Terminal and the Pier Transportation Terminal.

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[7] NW's witness, D. Virgil Corcoran, a sales manager in Cincinnati between 1992 and 1998, states that no customer mentioned to him that the NS (CNOTP) $196 round trip intermediate switching charge for GTW (now IORY) traffic moving through Gest Street Yard was a deterrent to or a restriction on their business.

[8] NW indicates that its own grain traffic has been unable to reach the Consolidated Grain and Barge terminal through the CIND for the same reasons, CIND's revenue requirements and the expense of completing the movement by truck.

Finally, NW indicates that, even if IORY purchased the Riverfront Track, NW has no obligation to repair the CNOTP High Line connection. It adds that, even if that bridge were repaired, the bridge would simply provide IORY with another route for overhead traffic into Gest Street Yard, not a direct connection with CIND, which is the reason given for IORY's current attempts to acquire the Riverfront Running Track.

The City responds that there is absolutely no transportation need that supports retention of the Riverfront Track, just as there has been literally no traffic on the line for 12 years. The City states that the retention of rail freight service on the Riverfront Track, which IORY seeks, would jeopardize the feasibility of the redevelopment project. It states that Hamilton County, for example, has explained in its March 9, 1998 letter to the Board that the continuing presence of the Riverfront Track threatens to disrupt the new Bengals stadium and subject the County--and local taxpayers--to significant late penalties. The City argues that, even if construction of various elements of the redevelopment project could be completed if IORY purchased the line, the rail freight operations which IORY seeks to perpetuate would menace and drive away the crowds of pedestrians and visitors that the Riverfront is specifically intended to attract. In addition, the City argues that there are potential safety impacts of operating trains on the Riverfront Track through the central Riverfront area.

The City also challenges IORY's argument that IORY's rail service on the Riverfront Track would not be incompatible with the proposed Riverfront redevelopment. The City points out that IORY has never once suggested that freight trains would actually operate on the current site of the Riverfront Track should IORY be allowed to file and consummate an OFA for that track. Rather, the City states that IORY's position in this proceeding is premised entirely on the presumption that IORY's freight operations can and would simply be relocated into the Fort Washington Way trench and onto the commuter rail tracks that IORY asserts will be constructed there. However, the City indicates that there are no existing plans as part of the current reconfiguration of the Fort Washington Way or other Riverfront redevelopment projects to construct a commuter rail or light rail line along the Riverfront. According to the City, the Fort Washington Way reconstruction is designed to accommodate such a transit project should one be pursued in the future, but such decisions are many years away and subject to numerous variables.

Richard Mendes, the Deputy City Manager of the City of Cincinnati, indicates that, while the Fort Washington project would accommodate the future construction of a commuter rail line, it quite plainly does not include a double tracked rail line as described in IORY's comments. In addition, Mr. Mendes

states that, even if a commuter/light rail line were present along Fort Washington Way, IORY's operations along that line would entail many of the difficulties inherent in freight operation on the current Riverfront Track. Mr. Mendes claims that IORY's statement that such operations would be trenched and not disturb other planned Riverfront projects is untrue. Mr. Mendes states that the redevelopment plans indicate that an "at-grade" crossing would be required at Broadway--one of downtown Cincinnati's primary north/south thoroughfares, and preliminary location plans show an at-grade crossing at Central Avenue. Mr. Mendes states that these at-grade crossings used by rail freight operators would result in potential safety problems, and delays for vehicles and pedestrians.

In this proceeding, we have decided to allow NW to abandon its Riverfront Track, so that the City's Riverfront redevelopment project can proceed. Similarly, in *GTW Adverse Discontinuance, supra*, served concurrently with this decision, we found that the public convenience and necessity dictated that GTW's trackage rights over the line should be discontinued, so that the line could be abandoned and that the City's Riverfront redevelopment project could proceed. Given these findings, we will not allow our jurisdiction of the OFA provisions to be used to frustrate the operations of the City of Cincinnati and State of Ohio laws. We also will not allow IORY to use the OFA provisions of 10904 to defeat our adverse discontinuance of trackage rights finding and our exemption from section 10903 in this proceeding.

Where no overriding Federal interest in interstate commerce exists, we will not allow our jurisdiction to shield a railroad, or any party seeking relief before us, from the legitimate processes of state law. *See, Modern Handcraft, Inc.--Aban.*, 363 I.C.C. 969 (1981) (*Modern Handcraft*); *Kansas City Pub. Ser. Frgt. Operation--Exempt.--Aban.*, 7 I.C.C.2d 216, 224-226 (1990); and *Chelsea Property Owners--Aban.--the Consol. R. Corp.*, 8 I.C.C.2d 773, 778 (1992), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994). Section 10904 requires us to give preference to arrangements for continued rail service over other alternatives. But, under the statutory standards governing abandonment cases, we cannot view that interest as absolute. *Modern Handcraft* would be rendered a nullity if anyone could invoke section 10904 to perpetuate jurisdiction over property, which we have found, under section 10903, should be subject to the operation of state, local or other Federal law. *See, The Land Conservancy of Seattle and King County--Acquisition and Operation Exemption--The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No. 33389 (STB served May 13, 1998) and consolidated cases (*Land Conservancy*).

As our predecessor agency long held, we believe that, in the exercise of our abandonment jurisdiction, we must consider arguments that there exist overriding public purposes sufficient to justify our withdrawing our jurisdiction where that jurisdiction would operate to defeat a paramount public purpose. In appropriate situations, we will allow the displacement of rail service by other public purposes where the public interest justifies that end. Accordingly, we find that our authority under sections 10903 and 10904 would permit us to deny a petition requesting the Board to establish the conditions of sale and amount of compensation under section 10904, even if the petitioner were a financially responsible person as defined by 49 U.S.C. 10904(d)(1).

We find that NW, the City, and the County have shown that the right-of-way is needed for a valid public purpose, *i.e.*, multi-purpose improvements for the City's downtown area. IORY and GTW do not challenge the fact that the City's Riverfront project is needed for a valid public purpose. Presently, the Riverfront Track, the Fort Washington Way expressway (I-71/U.S. 50) and existing surface parking lots serve as barriers between Cincinnati's central business district and the north bank of the Ohio River. As part of a series of planned improvements that will cost nearly $1 billion in public investment, Fort Washington Way will be reconfigured, multi-purpose structured parking lots will replace surface parking lots and, in the absence of the railroad tracks, as well, the riverfront parks will be expanded and reconnected with Cincinnati's downtown. Other components of the Riverfront revitalization include a new Cincinnati Bengals football stadium (to be constructed by Hamilton County), a possible new Cincinnati Reds baseball stadium, a multimodal passenger transportation center and a regional family oriented cultural/ entertainment district, expected to be anchored by the National Underground Railroad Freedom Center (a 125,000 square foot interpretive museum and education center) and a large-screen formal theater for the Cincinnati Museum Center.

We also find that there is no overriding public need for continued rail service over the Riverfront Track. The track has not been used for more than 11 years and overhead traffic has been rerouted. No shipper will lose rail service as a result of the abandonment. Arguments that the trackage is needed because of congestion in Cincinnati, excessive switching rates by NW and CSXT, and NW's operating restriction at Gest Street Yard under the 1993 Agreement, are unpersuasive. We have received no complaints that rail service at Cincinnati is inadequate. Nor have we received any complaints that switching charges or any other rail rates are excessive. NW has offered evidence of a number of competitive options to the transloading rail/barge facilities on the Ohio River that were not mentioned by IORY and GTW. It appears that IORY has other

alternative options to routing its traffic over CSXT and NS lines. In addition, while GTW attacks the alleged exorbitant switching charges of NS and CSXT, no evidence is presented as to what the costs of IORY would be of providing service over the Riverfront track. CIND's revenue needs and the additional truck costs would have to be accounted for. In addition, the cost of building a new relocated track over the Riverfront area was not discussed by IORY. We are not persuaded that the Riverfront Track would be more efficient and less costly than all other options. IORY's asserted plans to operate overhead grain trains on the Riverfront Track to and from CIND are thus speculative. Only one of the five entities supporting IORY's purchase actually identified potential traffic that would move over the line. However, this traffic would only move if economically feasible. The GTW argument that IORY ownership of the Riverfront Track is necessary because of the operating restrictions imposed under the 1993 Agreement is not persuasive justification given that IORY has apparently alternative direct routes to the Ohio River that are not so restricted.

IORY's arguments boil down to a claim that it would be preferable to have three lines rather than two to serve the Cincinnati docks. But that carrier's assertion that there is a public need for rail service on the Riverfront Track is belied by the fact that the line has not carried one pound of freight in more than a decade. IORY's sudden discovery of a demand for its services over this track in light of the Riverfront redevelopment project is neither persuasive nor meritorious.

In *Land Conservancy*, we declined to grant an exemption from section 10904. There, we asserted our authority to deny a request that we set terms and conditions to force the sale of a line for continued rail service. But we noted that, because that line was currently inactive and because there appeared to be no demand for rail service, anyone invoking section 10904 should be prepared to submit not only evidence of financial responsibility but also evidence of a public need for continued rail service.

Here, the line is inactive and has remained so for many years. Moreover, we have received a request for expedited action from Hamilton County, supported by Senator DeWine and the NW. Hamilton County stated, on March 9, 1998, that "contractors are currently working around the unused track, but they are rapidly approaching the point where construction will have to be delayed until the track can be removed." Part of the Riverfront redevelopment project is a stadium for the Cincinnati Bengals professional football team. Hamilton County states that it is subject to substantial financial penalties if it fails to complete the stadium by August 2000, and that "* * * any significant delay in removal of track could result in the imposition of millions of dollars in penalties on the taxpayers of Hamilton County."

The facts of this case are such that, in addition to justifying a denial of a request to set terms and conditions under section 10904, the public interest supports exempting NW from the provisions of section 10904. Hamilton County is engaged in a major public works project. Absent an exemption, NW will be unable to promptly consummate the abandonment authority we grant here. For the reasons noted above, we see little or no demand for rail service on the Riverfront Track and a great need to use the property for a nonrail public purpose. Under these circumstances, we can see no basis to deny NW's request to be relieved from the provisions of section 10904.

We find that the section 10502 criteria for granting an exemption from the provisions of sections 10904 and 10905 have been met. The transaction is limited in scope because the Riverfront Track is only 1.5 miles long and because no shippers will lose service. No shipper has used this line for more than 11 years and because overhead shippers have competitive routing alternatives, we find no abuse of market power. The requested exemptions will reduce the need for Federal regulatory control over the rail transportation system, 49 U.S.C. 10101(2), reduce regulatory barriers to exit from the industry, 49 U.S.C. 10101(7), and avoid safety concerns inherent with utilizing the Riverfront Track for freight operations, 49 U.S.C. 10101(8).

Also, we find IORY's argument, that an exemption does not lie because the OFA provisions are mandatory in nature, to be without merit. There is nothing exceptional in the language of section 10904 that would make it any less susceptible to the Board's exemption authority than any other section of the Act.[9] Many sections direct the Board to do, or not do, something if certain conditions are met or certain circumstances exist. Under IORY's reasoning, any section that was mandatory in nature would be shielded from the exemption process. We believe that Congress did not intend such a limitation on the use of the Board's exemption authority. To the contrary, Congress provided in section 10502 that the Board shall use its exemption authority "to the maximum extent consistent with this part." When Congress wished to preclude the use of exemptions with respect to certain sections of the Act, they knew how to do so. The Board is specifically prohibited from granting exemptions with respect to section 11706 and with respect to employee protection in 49 U.S.C. 10502(e) and (g). No such prohibition exists as to section 10904. Accordingly, we find

[9] The Act refers to the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803.

that we have jurisdiction to exempt the abandonment transaction from the OFA provisions of 10904 and similarly from the public use provisions of 10905.[10]

Exemptions from sections 10904 and 10905 have been granted from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.[11]

To accommodate the requests for expedition, we will grant an exemption from 49 U.S.C. 10904-05 and make the decision effective on 10-days' notice. Having exempted the proposed abandonment from 49 U.S.C. 10904-05, we have eliminated the need to extend the effective date of the abandonment exemption to consider OFAs and requests for public use conditions.

Labor Protection

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of a statutory obligation to protect the interests of its employees. Accordingly, we will impose the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), as a condition to granting this exemption.

Environmental Issues

NW has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. *See,* 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified its data, and analyzed the probable effect of the proposed action on the quality of the human environment.

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[10] NW will not negotiate with any party for the transfer of the line for trail use because it has already agreed to transfer the line to the City for public purposes. Consequently, trail use procedures would not be fruitful and thus are unnecessary.

[11] *See, K & E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS,* STB Docket No. AB-480X (STB served December 31, 1996) at 4, citing *Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), *et al.* (ICC served December 23, 1994); *Missouri Pacific Railroad Company--Abandonment--In Harris County, TX,* Docket No. AB-3 (Sub-No. 105X) (ICC served December 22, 1992); *Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA*, Docket No. AB-1 (Sub-No. 226X), *et al.*, (ICC served July 14, 1989); and *Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA*, Docket No. AB-284 (Sub-No. 1X) (ICC served April 1, 1988).

In the environmental assessment (EA) served on March 30, 1998, SEA indicated that the National Geodetic Survey (NGS) has identified two geodetic station markers that may be affected by the proposed abandonment. SEA, therefore, recommends that we impose a condition requiring NW to consult with the NGS at least 90 days' prior to conducting any activities that would disturb or destroy the markers.

No comments to the EA were filed by the April 24, 1998, due date. Based on SEA's recommendation, which we adopt, we conclude that the proposed abandonment, if implemented subject to the above condition, will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903-05 the abandonment by NW of the above-described line, subject to: (1) the employee protective conditions in *Oregon Short Line R. Co.--Abandonment--Goshen*, 360 I.C.C. 91 (1979), and (2) the condition that NW consult with the NGS at least 90 days' prior to conducting any activities that would disturb or destroy the noted geodetic station markers.
2. The exemptions will be effective on May 23, 1998.
3. Petitions to stay must be filed by May 18, 1998.
4. Petitions to reopen must be filed by June 2, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.